IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL.

Second Appeal No. 575/2001
(Old No. 201/1987)

The State of U.P. through
Collector, Nainital. …..Appellant.

Vs.

Virndra Kumar son of Vidya Ratan,
R/o Bhotia Parao, Civil Lines,
Haldwani, District Nainital …. Respondent.

Sri J.P. Joshi, learned Standing Counsel for the State.
Sri Anil Dabral, in brief for Sri D.S. Patni, Advocate
For the respondent.

(Hon'ble B. C. Kandpal, J.)

This Second appeal, U/S 100 C.P.C. by the defendant has been filed against the judgment and decree dated 3-10-1986 passed by the Additional Civil Judge, Nainital, in Civil Appeal No. 85 of 1985, whereby the appeal was dismissed and the judgment and decree dated 6-11-1985 passed by the Munsif Haldwani in O.S. No. 52/1983 Virendra Kumar Vs. State of U.P. has been affirmed.

2- Brief facts of the case, are that in the year 1968-69 lot No. 8, Forest Range Lohaghat was purchased in auction by the plaintiff/respondent on 20-8-1968. He invested money in preparing slippers in the aforesaid lot. However, he could not make full payment to the Forest Department of the auction-sale. The Forest possession and these slippers were auctioned in the year 1982 for Rs. 115/. According to the plaintiff the auction of these 1194 slippers was not made in accordance with the rules and with the size of the slippers. After the auction of the slippers, the Forest Department sent recovery against the plaintiff, to the revenue authorities for the balance sum of Rs. 52,550-15 P. The Tehsildar Haldwani thereafter issued citation against the plaintiff. The plaintiff on apprehension of his arrest, filed the civil suit for permanent injunction without giving notice to the State/Department U/S 80 C.P.C.

3- The defendant/appellant contested the suit and filed its W.S. In the W.S. the allegations of the plaint were denied. According to the State of U.P. when the plaintiff/respondent did not pay the full amount of auction-sale, the slippers were seized and were auctioned after following the rules. It was also pleaded that the plaintiff had instituted cases in various courts in between 1973 to 1979, disputing the recovery of the balance auction amount, hence the seized slippers could not be sold earlier. It was also pleaded that after the sale of the seized slippers, Rs. 52,550-15P. remained due against the plaintiff, hence recovery proceedings were initiated against him. It was also pleaded that the suit was instituted without giving notice U/S 80 C.P.C. to the State and the suit has been undervalued and insufficient court has been paid in the suit.

4- On the pleadings of the parties, the following issues were framed in the civil suit:-

1- Whether the defendant illegally sold 1194 slipper which were in the control of Tanakpur Depot?.
2- Whether the defendant, at the time of auction, displayed size of the slippers lot-wise?.
3- Whether the auction by the defendant was forged and ostensible, as alleged in para Nos. 5 and 6 of the W.S.?. If so, its effect?
4- Whether the defendant is liable for 1194 slippers of the plaintiff?. If so, its effect?.
5- Whether the suit is not maintainable without issuing notice 80 C.P.C.? If so, its effect?.
6- Whether the suit is undervalued?. If so, its effect?.
7- Whether the court has got no jurisdiction to hear the suit?.
8- Relief, if any, to which the plaintiff is entitled to get?.

5- Parties adduced documentary as well as oral evidence before the trial Court The trail court after perusal of the evidence on record and hearing learned counsel for the parties, decreed the suit of the plaintiff declaring that the auction dated 20-1-1982 conducted by the

defendant was ostensible and forged one and the auction was accordingly rejected. The defendant was also restrained, by the decree of permanent injunction, from recovering the balance amount of auction-sale by adopting illegal means. However, the defendants were held free to recover the balance amount by adopting legal means.

6- Feeling aggrieved, the State of U.P. preferred first appeal before the Additional Civil Judge, Nainital, which was dismissed by the first appellate court, vide impugned judgment and decree dated 3-10-1986.

7- Thereafter the appellant/defendant has preferred this second appeal before the Allahabad High Court, which has been transferred to this court, after creation of new State.

8- At the time of admission of the second appeal, the following substantial questions of law were framed for determination:-

1- Whether the suit was maintainable in the absence of notice U/S 80 C.P.C.?

2- Whether the suit was barred by the provisions of Specific Relief Act?

3- Whether the suit was barred by Section 287-A U.P. Z.A. & L.R. Act?.

4. Whether the suit was barred by Section 3(5) of U.P. Public Moneys (Recovery of Dues) Act, 1972?.

9- Heard learned counsel for the parties and perused the record.

10- Perusal of the record shows that the plaintiff has instituted the suit before the Munsif Haldwani on 11-3-1983. Along with the plaint, he also filed application U/S 80 (2) C.P.C. (paper No. 5-C/1 & 2) seeking permission to file the suit without issuing notice to the State. The trial court vide its order dated 14-3-1983 allowed the application and permission was granted to institute the suit without issuing notice U/S 80 C.P.C. The aforesaid order has not been challenged by the State by filing appeal and the State cannot agitate this point in this

second appeal.

11- So far as the other substantial questions of law framed in the appeal, are concerned, the suit was filed for declaration, cancellation of auction held by the defendant of 1194 slippers belonging to the plaintiff and for permanent injunction restraining the defendant for realizing the remaining auction-sale amount. For the reliefs sought by the plaintiff, fixed court fee has been provided, which was paid in the suit. The courts below have recorded categorical finding that the court fee was not to be paid on the balance unrecoverable amount of Rs. 52,550-15 P. but it was to be paid for the injunction sought by the plaintiff. I find no illegality in the finding recorded by both the courts below in this regard.

12- The citation issued against the plaintiff was with regard to the balance amount and the plaintiff's case is that the auction of his slippers made by the defendant was ostensible and illegal and the auction itself was sought to be quashed by issuing permanent injunction. The courts below also held that the market price of the slippers should have been deducted from the balance amount for which citation was issued against the plaintiff and the auction dated 20-1-1982 conducted by the defendant has been held illegal and was rejected by the trial court, which was affirmed by the first appellate court. Both the courts below have recorded concurrent finding of facts on this point. The validity of the impugned citation issued against the plaintiff was questioned by the plaintiff, hence the civil court has got jurisdiction to entertain and decide the suit. The suit cannot be said to be barred by the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972 as well as the provisions of U.P. Z.A. & L.R. Act and Specific Relief Act.

13- In view of above, I find that the substantial questions of law framed in this second appeal, have got no substance and the same are decided against the appellant.

14- I do not find any illegality, infirmity and incorrectness in the concurrent findings of facts recorded by both the courts below. In the second appeal the concurrent finding of facts cannot be interfered with, howsoever erroneous may be.

15- The second appeal lacks merit and is liable to the dismissed.

16- Accordingly the second appeal is dismissed. The impugned judgments and decrees passed by both the courts below are hereby confirmed. The stay order dated 31-7-1987 stands vacated. No order as to costs.

(B.C. Kandpal, J.)

Dated: 20-11-2006

ISB